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No. 307

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

JAMES EDMUND BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Orders below	1,2
Jurisdiction	2
Questions presented	2
Statutes involved	2,3,4
Statement:	
1. The facts	5,6,7
2. Proceedings before the Army Board for Correction of Military Records	6,7
Reasons for granting the Writ	7,8,9,10
Conclusion	10

CITATIONS

Cases:	Page
Friedman v. United States 310 F (2d) 381 (1962)	8,9
Ogden v. Zuckert 298 F (2d) 312 (1961)	9
Oleson v. United States 172 Ct. Cls. 9 (1965)	9
Patterson v. United States 141 Ct. Cls. 435	8
Proper v. United States 154 F. Supp. 317 (1957)	8
Miscellaneous:	
2 Sutherland, Statutory Construction (3rd Ed. Horack 1943), and 1968 Cum. Supp.	8

Orders below (Appendix A,B)	1a,2a
Army Regulations No. 15-185 (Appendix C)	3a,4a,5a
Dept. of Army letter of September 1,1961 (Appendix D)	6a

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JAMES EDMUND BRADY, PETITIONER

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_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner's counsel, William R. Kraham, on behalf of the petitioner, James Edmund Brady, petitions for a writ of certiorari to review the order of the United States Court of Claims entered in this case on October 9, 1967, and the subsequent order of the same court denying petitioner's motion to alter or amend the aforemen - tioned order on April 19, 1968.

ORDERS BELOW

The October 9, 1967 one page order of the United States Court of Claims (App. A, infra p. 1a) dismissing the petition as barred by the six year statute of limi - tations, 28 U.S.C. 2501, without oral argument is unreported. Said order of the Court of Claims fixes October 12, 1960 as

the date from which the six year statute of limitation began to run; the petition below having been filed November 25, 1966. Plaintiff's motion to amend or alter the October 9, 1967 order of the Court of Claims and a motion to permit oral argument thereon, was denied by said court on April 19, 1968. (App. B, infra p. 2a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Did the October 12, 1960 denial by the Army Board for Correction of Military Records of petitioner's application for retirement by reason of physical disability start the running of the six year statute of limitations?

2. Did the February 1962 denial by the Secretary of the Army of petitioner's continuing application for disability retirement start the running of the six year statute of limitations?

STATUTES INVOLVED

28 U.S.C. 2501, which provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

10 U.S.C. 1201 (Chapter 61 - Retirement or Separation for Physical Disability), which provides:

Sec. 1201. Regulars and members on active duty for more than 30 days: retirement.

Upon a determination by the Secretary concerned that a member of a regular componet of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training) for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under Section 1401 of this title, if the Secretary also determines that -

(1) based upon accepted medical principles, the disability is of a permanent nature;
(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
(3) either -
(A) the member has at least 20 years of service computed under section 1208 of this title; or
(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination; and either -
(i) the member has at least eight years of service computed under section 1208 of this title;
(ii) the disability is the prox-

imate result of performing active duty; or
(iii) the disability was incurred in line of duty in time of war or national emergency.

10 U.S.C. Section 1552 * * * (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of De - fense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to cor- an error or remove an injustice. Under procedures prescribed by him, the Sec- retary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this sec- tion is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice. * * * Aug. 10, 1956, ch. 1041, 70A Stat. 116.

STATEMENT

1. THE FACTS

On December 4, 1957, while on extended active duty, plaintiff was examined in the cardiology clinic at Walter Reed Hospital for evaluation to determine his fitness for release from active duty.

The plaintiff had a medical record, (for purposes of this action), going back to December 6, 1954, following his return from overseas duty in Korea and Japan, indicating that he was suffering from hypertensive vascular disease. His physical profile was then lowered to P-2 and his physical category was lowered to "B". (Pet. par. 8).

This condition showed further progression, and as the result of an annual service physical examination on January 17, 1956, the plaintiff's physical profile was lowered to P-3 and his physical category dropped to "C". The January 17, 1956 physical examination revealed that plaintiff, since July 1955, and continuously at and after January 17, 1956 had been under treatment by Dr. Leslie Upton for hypertensive cardiovascular disease. (Pet. par. 11).

The petition in this case shows the progressive physical deterioration of the plaintiff due to his hypertensive cardiovascular condition from December 6, 1954 to December 4, 1957. (Pet. par. 8 through 14). This condition was further manifested in the December 4, 1957 physical examination by a finding of "early left ventricular hypertrophy" and a dialated and tortuous aorta. (Pet. par. 14).

Despite the foregoing picture of clear and progressive physical deterioration of

plaintiff, he was nevertheless, as a result of the physical fitness examination of December 4, 1957 released from active duty on December 13, 1957 in the grade of Lt. Colonel, not by reason of physical disability. (emphasis supplied) (Pet. par. 15).

His continuing physical deterioration through January 8, 1959 due to the progress of this insidious ailment is depicted in the petition which shows, among other characteristic symptoms, a high systolic and diastolic blood pressure as a part of the pattern of this disease. (Pet. par. 8 and 16).

On March 7, 1960, plaintiff applied to the Army Board for the correction of Military Records for correction of his records to show that he was retired for service connected disabilities on December 13, 1957. On October 12, 1960, the Board denied his application, without having conducted a physical examination or making any reference to existing medical evidence, found by Army physicians during examinations of the plaintiff from 1955 through 1957. (Pet. par. 17).

Thereupon, the petitioner's then counsel filed an action in the nature of mandamus on January 27, 1961 in the U.S. District Court for the District of Columbia against Elvis J. Starr,Jr., then Secretary of the Army, (Civil Action No.279-61) to accord petitioner a hearing by ABCMR. This action was withdrawn on September 8, 1961 upon the written assurance dated September 1, 1961 of the ABCMR that a formal hearing would be granted by ABCMR. Pursuant to this September 1, 1961 agreement by ABCMR, a formal hearing was held on November 29, 1961 at which time Lt. Colonel Brady, petitioner, presented competent

and persuasive medical evidence demonstrating the progressive nature of his ailment and showing that he was, in December 1957, physically unfit for general service and that he should have been retired for disability on December 13, 1957. Nevertheless, the ABCMR, on February 23, 1962 advised plaintiff that his application for disability retirement was denied by the Secretary of the Army on February 14, 1962. (Pet. par. 20,21). (Underscoring supplied).

At the present time petitioner has a 100 percent total and permanent physical disability rating from the Veterans' Administration, illustrative of the progressive and continuing nature of his long standing hypertensive cardio-vascular ailment.

REASONS FOR GRANTING THE WRIT

The statute relating to the retirement of members of the armed forces on active duty for physical disability (10 U.S.C. 1201) infra, pp. 2-4, and the statute governing the correction of military records (10 U.S.C. 1552) infra, p. 4, both assign vitally important review function to the Secretary of the military department involved, empowering him to modify, alter, affirm or reverse the action of the ABCMR. Hence, the basic principles of exhaustion of administrative remedies, as well as established principles governing statutory construction which give effect to every word, clause and sentence of a statute, are requisite to a proper application of both of these statutes, giving full scope to the final reviewing powers of the Secretary of the Army herein over the action

of the ABCMR.[1]

A fortiori, the time from which the petitioner herein could seek judicial review in the Court of Claims from the final administrative determination of the Secretary of the Army under 10 U.S.C. 1552 was the date of the Secretary's final action, February 14, 1962, well within the six year period in which the petition was filed by petitioner in the Court of Claims.

Petitioner contends that this construction is also sanctioned by Friedman v. United States, 159 Ct. Cls. 1, 310 F (2d) 381 (1962), Cert. Den. 373 U.S. 932 (1963). The Court of Claims in that case at 310 F (2d) 381, 390 stresses the need for finality of Board action to start the limitations period. In this same decision at page 392, the Court states, citing Proper v. U.S., 139 Ct. Cls. 511,512,513, 154 F. Supp. 317,318 (1957) and Patterson v. U.S., 141 Ct. Cls. 435,438 * * * "All of these Boards, the Retiring Board, the Disability Review Board, and the Board for the Correction of Military Records act only in an advisory capacity to the Secretary of War. If his decision on the retirement rights of an officer is alleged to have been arbitrary, then the officer's right to come to the Court for redress accrues as soon as the arbitrary decision

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[1] Sutherland, Statutory Construction, (3rd Ed. Horack, 1943), Section 4705, p. 339 and Id., 1968 Cumulative Supplement, pp. 139-140.

is rendered."[2] (Underscoring supplied).

The instant case is replete with irregularities in the administrative proceedings since the decision of the ABCMR was clearly tentative, invited reopening, and was in fact reopened by this ABCMR. Friedman v. U.S., supra 396 wherein the Court stated in pertinent part the following:

> "(c) A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality."

Petitioner contends that any ambiguity in the statute (10 U.S.C. 1552) as to the Secretary's action being a prerequisite to finality, should not produce a narrow and inequitable construction of its remedial purposes so as to permit a callous deception of a disabled officer and deny him his day in court. Oleson v. United States, 172 Ct. Cls. 9 (1965); Ogden v. Zuckert, 298 F (2d) 312,314,315 (D.C. Cir. 1961).

Petitioner herein made but one application to one board only, the ABCMR, on March 7, 1960 subsequent to his December 13, 1957 non-disability discharge and said application was continuously asserted until final action by the Secretary of the Army on February 14, 1962. Friedman v. United States, supra, at p. 404 (showing legislative history).

[2] Friedman v. U.S., 310 F (2d) 381,404 showing that Congress intended the Secretary's authority to be final and conclusive except for computation of amounts.

The continuous volume of applications for disability retirement over the years and the inevitable increase due to the present hostilities, coupled with the confusion and conflict arising from the actions of the several boards of the armed services in connection with the entitlement or denial of disability retirement, and the vital question of finality pertaining thereto, make mandatory a clarification of the limitations aspect of the statutes involved in these cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

William R. Kraham,
Counsel for
Petitioner.

Irvin M. Gottlieb,
Of Counsel.

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

James Edmund Brady

v.

The United States

Before Cowen, Chief Judge, Laramore, Durfee, Davis, Collins, Skelton, and Nichols, Judges.

ORDER

This case comes before the court on defendant's motion, filed January 24, 1967, to dismiss plaintiff's petition. Upon consideration thereof, together with the opposition and responses thereto, and without oral argument, it is concluded that plaintiff's alleged claim is barred by the statute of limitations, 28 U.S.C. 2501, in that plaintiff's cause of action accrued no later than the denial of plaintiff's first request to reconsider the decision, on October 12, 1960, by the Army Board for Correction of Military Records, and

IT IS ORDERED that defendant's said motion be and the same is granted and plaintiff's petition is dismissed.

OCT. 9,1967

BY THE COURT
Wilson Cowen
Chief Judge

APPENDIX B
(Pertinent portion)
(of Order)
IN THE UNITED STATES COURT OF CLAIMS

404-66 James Edmund Brady

v.

The United States

ORDER

Before Cowen, Chief Judge, Laramore, Durfee, Davis, Collins, Skelton and Nichols, Judges.

These cases come before the court on motions for reconsideration, rehearing, new trial, modification of judgment, to alter or amend orders and opinions of the court, for oral argument, and for further relief under Rules 68 and 69 of the Rules of this court and, on con - sideration thereof,

IT IS ORDERED this 19th day of April, 1968, that said motions be and the same are denied as follows:

404-66 James Edmund Brady. Plaintiff's motion to alter or amend the order of October 9, 1967, and plaintiff's motion to permit oral argument on plaintiff's pending motion pursuant to Rule 68(b).

BY THE COURT

Wilson Cowen
Chief Judge

APPENDIX C

(Pertinent parts of Army Regulations No. 15-185). Authority: 10 U.S.C. 1552.

BOARDS, COMMISSIONS, AND COMMITTEES

Army Board for the Correction of Military Records.

Section II, Par. 4.

4. Functions. The function of the Board is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice and to make appropriate recommendations to the Secretary of the Army.

Section III, Par. 10.

10. Review of application. Each application and the available military or naval records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing or to deny the application without a hearing. The Board will make this determination in all cases except those in which the application has been denied administratively for the reason that the applicant has not exhausted all other effective administrative remedies available to him or for the reason that the applicant did not file application within 3 years after he discovered the alleged error or injustice and did not submit any reason why the Board should find it to be in the interest of justice to excuse his failure to file the application within the prescribed 3 years. In connection with any application which it considers, the Board may recommend to the Secretary that the records be corrected, as requested by the

(cont'd) APPENDIX C

applicant, without a hearing. The Board may deny an application if it determines that insufficient evidence has been presented to indicate probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him, that effective relief cannot be granted, or that the applicant did not file his application within 3 years after he discovered the alleged error or injustice and that insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed 3 years. The Board will not deny an application on the sole ground that the record or records involved were made by or by direction of the President or the Secretary in connection with proceedings other than proceedings of a board for correction of military or naval records. If the application is denied, the applicant will be advised of the denial and that he is prvileged to submit new and material evidence for consideration.

Section VI, Par. 20,21,22.

20. Action by Secretary of the Army. The record of proceedings of the Board will be forwardedto the Secretary of the Army who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the Board for further consider - ation when deemed necessary.

21. Staff action. a. Upon final action by the Secretary of the Army the complete record in each case will be returned to the Board. The Board will

(cont'd) APPENDIX C

transmit the decision of the Secretary of the Army to the Adjutant General for appropriate action.

b. Upon receipt of the record of proceedings after final action by the Secretary of the Army, the Board will communicate the decision to the applicant and counsel, if any.

c. When all necessary administrative action has been completed the applicant will be informed of such action by The Adjutant General.

d. Written notice specifying the action taken and the date thereof will be transmitted to the Chairman of the Board.

e. The record of the decision of the Secretary of the Army will not be filed in the military records of the subject of the application where the effect of such action would be to nullify the relief granted.

f. After action by the Secretary of the Army on the record, the applicant or his counsel is entitled, upon request, to inspect the record of proceedings and to receive a copy of the Board's findings, conclusions, and recommendations, unless the Chairman considers that granting the request would be detrimental to the public interest.

22. Reconsideration. After final adjudication further hearing before the Board will be granted only upon presentation by the applicant of newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Army.

APPENDIX D

Department of Army

1 September 1961

Ford E. Young,Jr., Attorney
1125 Warner Building
501 13th Street, N.W.
Washington 14, D.C.

Dear Mr. Young:

This is in reference to the application of Lieutenant Colonel James E. Brady, 0 268 273 to the Army Board for Correction of Military Records.

The depositions of Doctors Frank A. Finnerty, Jr. and Bingham Boyce which you have provided have been reviewed and considered. It has been determined that this case will be formally heard by the Correction Board. It must be emphasized, of course,that the granting of a hearing in this matter does not in any way predict that relief will be granted as the Board considers each case on its individual merits.

In accordance with our conversation, it is understood that a complaint filed in the U.S. District Court for the District of Columbia (Civil Action #279-61) will appropriately be withdrawn. Upon receiving advice from you that this step has been taken, the Correction Board will be instructed to contact you and Colonel Brady relative the formal hearing. It is hoped that these arrangements are satisfactory for your needs.

With regards and best wishes, I am,

Sincerely yours,

Francis X. Plant
Special Assistant

copy furn:Mr. Plant
ASG, OSA
BCMR